

# Gauteng workshops on legislative drafting

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February 20, 1995

**A MEMORANDUM CONCERNING THE DEVOLUTION OF POWER CONCERNING  
CULTURAL AFFAIRS TO THE PROVINCES**

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**INTRODUCTION**

This Memorandum responds to the following:

- (1) Proposed amendments to the Culture and Promotion Act, No. 35 of 1983;
- (2) Proposed amendments to the Cultural Affairs Act, No. 65 of 1989; and
- (3) correspondence from Gauteng Ministry of Sport, Recreation, Arts and Culture.

**I. THE PROBLEM PRESENTED**

1. This problem arises in the context of the devolution of power concerning cultural affairs from the national government to the provinces, pursuant to sections 126 and 235(8) of the Constitution. Schedule 6 mentions 'Cultural Affairs'. Pursuant to section 235(6)(a)(ii) and (b)<sup>1</sup>, there devolves to the Provincial authorities all laws with regard to culture, except insofar as their subject-matter falls under Sec. 126(3)(a) -- the only subsection of §126 that conceivably seems relevant.

2. §235(8) contains provisions that triggers the present discussion. Under that section, by proclamation in the Gazette the President must assign the administration of the laws involved to the provinces. In doing so, he may amend or adapt the law to regulate its application or interpretation. [§235(8)(b)(i)]. He may also 'regulate any other matter necessary, in his or her opinion, as the result of the assignment, including matters relating to . . . the transfer of assets...including funds, to or from the national or provincial government or any department of state, administration...or other institution.'

**II. THE NATIONAL MINISTRY'S PROPOSED AMENDMENTS**

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<sup>1</sup> §235(6) provides that everything mentioned in Schedule 6 devolves to the Provincial authorities, except matters reserved to the national government by the exceptions mentioned in §126(3). Sub-section (a) excepts matters 'that cannot be regulated effectively by provincial legislation'; subsection (b), with matters that 'to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic'.

3. In the context of devolution of the two laws mentioned, the national Ministry of Culture has suggested certain amendments to the two laws mentioned. It is these proposed amendments that lie at issue, together with the terms of the Proclamation that the Ministry proposes to submit to the President for promulgation. This Memorandum (1) critiques the proposals made, and (2) suggests alternatives.

4. The central difficulty with the proposal; (and indeed with the two laws involved) concerns their complete abdication of power to the discretion of the national Minister. Consider the proposed Proclamation assigning the 1983 Act to the Provinces. It recites that the President assigns to the Provinces the administration of that Act, 'excluding those provisions (if any [sic!]) of the said Act which fall outside the functional areas specified in Schedule 6 of the Constitution or which relate to matters referred to in paragraphs (a) to (e) of the Constitution'. That leaves to future interpretation every difficult problem connected with the devolution.

5. The amendments do no better. The amendments altogether duck the question by using the word 'Minister' to mean either the provincial or the national Minister, depending upon whether the function involved is properly provincial or national.<sup>2</sup> Read in the context of the complete vagueness of the proposed Proclamation, in effect this says only this: We are assigning something or other concerning culture to the Provinces; we are retaining something or other to the Ministry. For example, §2(b)(i) provides that 'the Minister' may 'award bursaries to persons in other countries for the purposes of study or research in the Republic.' Whether that function falls to the national or the provincial Minister of Culture depends on whether one thinks that that is a matter 'that cannot be regulated effectively by provincial legislation' [Constitution, §126(3)(a)], or a matter 'that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic.' Surely that might be argued both ways. (I gather that both the national and the provincial ministries contend that they should have power to make grants in this area, so the dispute is not hypothetical.) In effect, therefore, the proposed amendments merely leave altogether vague the scope of power of the national and provincial Ministers.

6. Even more difficult problems arise out of the operation of the proposed amendment to §2(3) of the 1983 Act. That is the only section of the Act that gives the Minister power to make grants to artists or other cultural workers directly. The proposed amendment

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<sup>2</sup> The Amendment reads that 'Minister' means the national Minister 'in so far as the administration of a provision of this act has not been ... assigned' to the Provincial administration.

would give the Minister power to provides services and to subsidize function in connection with culture that the Minister 'may deem necessary or expedient on a country-wide basis'.

7. The proposed amendments to the 1983 Act, §2(3) must be read in connection with the devolution of the 1989 Act. I do not have the proposed Proclamation concerning that Act. The amendments, are, however, unequivocal. Under them, 'Minister' means only the provincial authority. As amended, the 1989 Act therefore gives the Minister unlimited power to preserve, foster and extend the visual arts, music and the literary arts, technology and natural and human sciences, the utilization of leisure, 'and such other fields as the Minister may from time to time determine'. [§11(1)(f) read with §10 and §3(1)(c) and (d)]. That is to say, under these proposed amendments to the 1983 and the 1989 Acts, the national Minister has power to dispense funds and other resources with respect to 'country-wide' matters, while the provincial Minister has jurisdiction over the remaining matters. What is a 'country-wide' matter and what is not remains in the discretion of the national and the provincial ministers, with nothing to guide them.

8. If nothing more, that seems a recipe for chaos.

9. Moreover, the Constitution plainly gives the President the power to allocate resources to the provinces as part of the devolution process. {Constitution, §

10. The proposed Amendments further muddy the waters. They propose to amend subsection 2 by substituting for present subsection (3) a provision that provides that 'the Minister may (a) provide such services as he may deem necessary or expedient in relation to...culture on a country -wide basis....' Remember that the amendment states that 'Minister' can mean either the Provincial authority, or the national Minister. Presumably, matters of culture 'on a country-wide basis' falls within the language of the Constitution, §126(3)(a), quoted above (a matter that cannot be regulated effectively by provincial legislation). Literally read, that leaves entirely to the discretion of the national Minister and each of the provincial Ministers the discretion to spend money on anything they please, so long as they deem it to be 'country-wide' or not.

11. That seems a recipe for chaos.

12. The matter is further compounded by the failure of the proposed Declaration to allocate assets and funding to the provinces and the region. [See Constitution, §235(8)(b)(iii)]. As the Constitution recognizes, without a devolution of assets and funding, devolution remains a hollow shell.

### III. CRITIQUE OF THE EXISTING LAWS



13. Both bills as amended seem to leave unnecessarily broad discretionary powers in the Ministers, whether provincial or national. They have the power to use the funds available to their ministries however they choose, so long as the Minister deems it 'necessary or expedient' -- without even a requirement that the Minister justify the decision. One might easily construct an argument that that violates the Constitution, §24.<sup>3</sup> Even if it does not, it basically makes the administration of these two acts unaccountable.

#### IV. AN ALTERNATIVE PROPOSAL

14. Under the broad powers of the President in connection with a devolution under Constitutions, §235(8)(b), I suggest that basically a new law be drafted, with the following general characteristics. In particular, I suggest that it is imperative that some agreement be reached to allocate funding and existing assets. For convenience's sake, I append the suggested outline of the new bills as a Schedule to this memorandum. That proposal also contains suggestions about how to allocate existing estimates. What follows is a brief explanation and justification of that proposal.

15. The social problem that presents itself for solution concerns the behaviours of officials (subsumed under the term 'the Minister', but really meaning the Ministry) in performing their duties to encourage 'culture'. In the past, I gather that two complaints have surfaced: First, that the funding went entirely to foster the culture of the white minority, and even there, to foster elite, not popular, culture.

16. How to explain those behaviours? First of all, the laws themselves (the laws of 1983 and 1989) gave extraordinarily broad and unaccountable discretionary powers to the Minister. In effect, it gave him the authority to spend over R100,000,000 a year for the artists and programmes that the Minister deemed "necessary or expedient" to support -- without even a requirement that the Minister justify the choices. Experience teaches that that holds out great promises for corruption, and certainly for arbitrary governance. Absent any real oversight, the Minister surely had opportunity and capacity to support culture in terms of racial criteria (that was in terms required by the 1989 Act, §2), and, in the absence of any machinery to require otherwise, to act without any real accountability. In short, the central weakness of the

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<sup>3</sup> A Minister might under §2(3) of the 1989 Act, as amended, or §3(1)(d) of the 1983 Act, make a grant to a person, and explain the action to an unsuccessful candidate (under Constitution, §24(c) by stating only that the Minister deemed the award 'expedient'. That would make an administrative action under §24 impossible. Other constitutional arguments might be developed.

existing Acts lies in their absence of a process that ensures accountability in making grants under them.

17. Devolution raises four issues. One rests on past experience: How to ensure that the provinces do not replicate the same lack of accountability that the existing laws permit (and, if amended as suggested by the national ministry, will continue to permit)? How to ensure against racialism or ethnic exclusivity in making grants or giving support to cultural workers? How to allocate responsibility for funding different activities between the center and the provinces? How to allocate the funds available equitably between the center and the provinces, and among the provinces? This memorandum discusses each in turn.

18. Accountability. Two ways conceivably exist to ensure accountability. First, the statute (or subsidiary legislation under it) might articulate specific criteria for grants or other support. That probably comes close to impossible; nobody has yet managed to develop those criteria. The proposal therefore adopts the second method: Requiring peer review of each proposal, and requiring each peer panel to explain the reasons for granting or rejecting the proposal. The Minister can then fund or not, depending upon the recommendation of the panel, and the quality of its statement of reasons. That provides accountability, for the Minister can no longer make grants merely because it seems to the Minister 'necessary or expedient'.

19. Preventing racialism or ethnicity in grants. Three ways to protect against this suggest themselves. The first would in general terms prohibit any ministry (whether national or provincial) from taking race or ethnicity into account in making grants -- that is, a typical anti-discrimination clause that did little more than repeat the substance of the Constitution, §8(a) and (b). That sort of provision becomes almost impossible to enforce. As usually interpreted, it requires proof of official intent to discriminate -- and persons intent on subverting the Constitution or the law do not usually broadcast their purposes. A second provision would state procedures to make it possible to prove discrimination without proving the official's state of mind. The most direct way of doing this would be to compare the racial and ethnic content of grants made with the racial or ethnic content of applications submitted. Any discrepancy would suggest at least prima facie a discriminatory hand at work. A third device would try to develop a kind of affirmative action, plainly made constitutional by the Constitution, §8(3)(a). The present proposal adopts this solution. It adopts the presumption suggested in the second suggestion here, but varies it in two ways. First, it makes the presumption of discrimination irrebuttable. Second, to determine discrimination, it compares not the correspondence between the racial or ethnic profile of the grants and the applications for those grants, but between the grants and the racial and ethnic profiles of the relevant population (provincial

or national, as the case may be). Because of past discrimination, the black and colored populations have fewer artists likely to make funding applications than whites. To require funding in accordance with population ratios amounts to affirmative action. It is the kind of affirmative action, however, that ceases with the need; for when black and colored applications match their ration in the population, no affirmative action will continue.

20. Allocation of functions between center and provinces. As suggested the proposed amendments do not allocate the functions between center and provinces, they only guarantee continuing arguments about the problem. Three methods of solving the problem suggest themselves. The first is that contained in the existing laws and the proposed amendments: The national ministry provide services or funding to preserve, develop, foster or extend culture 'on a country-wide basis'. We suggest that that has almost no meaning. One could readily construe that to mean that the Provinces can fund little more than murals on the walls of local cities and towns. A Minister could easily maintain that all other functions -- for example, grants for writing, for visual arts, or for theater productions -- extend culture 'on a country-wide basis'.

A second might in effect give the local and national ministries concurrent jurisdiction. The national ministry would try to restrict itself to obviously 'country-wide' cultural efforts (for example, TV or cinema productions) while the provincial ministries would likely favour provincial artists, local acting groups, and the like. Nothing would offend the law, however, if one or the other stepped out of their proper roles.

A third, adopted in the present proposal, would abandon the country-wide- formulation as meaningless. Instead, it lists specific forms of cultural activities that the national ministry may fund: cinema, radio and television productions, and theatre production if half of the Provinces guarantee support for performances in their Provinces. (Nothing would bar the provinces from funding similar activities). This would remove the question of jurisdiction from ministerial discretion. It does bar the national ministry from making direct funding to individuals, no matter how famous or widely-read.

21. Allocation of funds between center and provinces, and among the provinces. These pose two separate questions.

a. Between center and provinces. We can see no intellectually satisfactory way of making this allocation. If one adopts the method of allocating functions adopted here, the allocation of funds between center and provinces becomes a function of the allocation of their respective functions. What proportion of the gross sums expended by the State for culture ought to go to cinema, television and radio productions, and to 'national'



theater, and what proportion to all the other aspects of culture? Even that division, however, can follow no rational formula. In lieu of that, we suggest a procedural solution. The present proposal would create a Council of Ministers of Culture. These would meet from time to time, and would annually bargain between themselves about the amount to be allocated to each.

b. Between the several provinces. Again, two possibilities suggest themselves. First, the provinces might share these funds in proportion to population. That might do serious injustice to the metropolitan centers (Johannesburg and Cape Town, particularly), which likely have more than their fair share of cultural workers. (On the other hand, it might induce some of these to move to provinces with small percentages of cultural workers, which might be no bad thing). Second, the proposal adopts the solution of taking an inventory of cultural workers, and allocating the available funds by the relative number of these in each province. (The proposal leavens this suggestion by providing for a bonus for deprived provinces (defined as having a smaller ratio of artists to population than 50% of the national average). This has the great disadvantage of requiring each province to take a census of artists and other cultural workers -- a project that may prove impossible to define.

22. Implementation. As do the present Acts, the proposal makes use of regional advisory councils, adding a national advisory council. It provides sanctions for ministries that violate the procedures of the act, or its anti-discrimination provisions, by reducing the grant for the succeeding year by the amount of the improperly-made grants.

#### **SCHEDULE A**

#### **SUGGESTIONS FOR A NATIONAL ARTS FUNDING LAW**

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['NMOC' means the national Ministry of Culture. 'PMOC' means a Provincial Ministry of Culture.]

#### 23. Allocation of funds

a. Block grants to provinces. The central government to make block grants to the provinces for culture.

i. Consider whether provinces must make matching grants of some percentage (at present, when provinces have no independent taxing capability, very small or nil; but increasing over the years.) [An excellent way to make the Provinces cough up support for culture.]

b. Allocation between NMOC and PMOCs. All funds

appropriated by the central government for culture to be allocated between the PMOCs and the NMOC in a percentage specified in the law (e.g.: 20% of all funds to go to the NMOC, 80% among the several PMOCs).

- i. As mentioned below, NMOC is limited in the objects for which it can spend money; PMOCs are not. The question for negotiation is in major part, what proportion of culture budget should be spent for cultural efforts to which NMOC is limited (bearing in mind that PMOCs may also spend money for these, but will probably spend greater proportions for more locally-presented art (e.g. wall murals, local theater groups, supporting art education in schools)? [I can no see of way of dividing the money between the NMOC and the PMOCs except by a negotiated figure. I suggest a way of negotiating that figure below.]
- c. Allocation between PMOCs. The 80%(?) of the funds allocated to the PMOCs by way of block grants to be allocated in proportion to the relative number of 'recognized artists' in the Province, plus a growth factor for provinces that vary more than 50% from the country-wide artists-to-population mean.
  - i. 'Recognized artists': This will require each PMOC as a condition of receiving a block grant to have a current list of 'recognized artists'.
  - ii. Explanation: Cannot divide up the funds available in terms merely of population, for probably there exists a much higher proportion of artists to the population in Jo'burg and Capetown than elsewhere. Very difficult problem to decide by what criteria a PMOC is supposed to determine who counts as a 'recognized artist' and there will be great incentive to PMOCs to inflate those numbers. This needs more thought. -- Provinces with low levels of recognized artists ought to receive some extra money to develop their artistic and cultural resources; hence the growth factor for provinces far below the national mean.

24. Powers of NMOC.

a. Objects of funding. NMOC may fund only the following:

- i. Productions of national interest for television, cinema and radio.

(1) All production to be dubbed in at least one

African language; or if in an African language, in English (or Afrikaans?).

- ii. Stage productions of national interest, but only if at least 50% (?) of the PMOCs guarantee support for performances in the Province.
- iii. International cultural relations (tours for foreign exhibits, tours of foreign artists, overseas study tours for SA artists and writers.
- iv. With the consent of two or more Provinces, assistance in developing artistic and cultural educational syllabi in schools and elsewhere, for use by Provinces.

b. All funding must meet criteria below.

25. Powers of PMOCs

- a. Objects of funding. PMOCs may fund any artistic work that meets criteria below.

26. Criteria for funding

- a. Non-discrimination. Funding must be non-discriminatory as to race, ethnicity or gender.
  - i. This merely restates the Constitutional requirement.
  - ii. If funding by NMOC and each PMOC as to amounts (and as to numbers? -- needs further thought) does not match within 20% the ethnic and gender distribution among the recognized artists in the national (for NMOC) and the province (for each PMOC), the funding agency will be conclusively presumed to have discriminated in making grants.
    - (1) Regulations must be worked out to determine how to count a group (e.g. a TV production unit that receives a grant) for these purposes. One idea: If the group's artists (actors, directors, cinematographers, costumers, producers, but not others) do not within 20% match the national or provincial distribution, as above, then it counts as a grant to the group in the majority.
    - (2) Explanation: As Justice Blackmun of the US Supreme Court once said, to get rid of racialism sometimes one must take race into

account. This is one of those times.

b. Substantive criteria. What counts as an artistic or cultural project for funding purposes?

- i. This cannot be solved in linguistic terms. I suggest that the only way to solve this is in terms of peer review. Neither NMOC nor a PMOC may make a grant unless a Peer Review Panel (chosen as described below) gives an affirmative rating to the proposal.

27. Implementation

a. Panel of Experts and Peer Review Panels.

i. Membership.

- (1) The Minister of NMOC and each PMOC to select a Panel of Experts, consisting of (say) 21 members
- (2) Each member to be either an artist, an academic involved in cultural work or an art critic. It may include members from outside the Province.
- (3) The Panel of Experts as a whole must meet the ethnic and gender distribution requirements mentioned above, and must so far as possible represent trends in the artistic world.

ii. Peer review panels.

- (1) The panel for any particular grant shall be chosen by rota or by lot.

b. Council of Cultural Advisors.

i. Membership.

- (1) Each cultural ministry to appoint a Council of Cultural Advisors (perhaps the same people as serve on the Peer Review Panels) to serve as an Advisory Council. It may include members from outside the Province.
- (2) The Council to include the Chair and at least three members of the relevant Parliamentary Committee on Cultural Affairs. It might also

include activists in various NGOs concerned with the arts and culture.

- (3) Council to meet at regular intervals (say, quarterly?)

ii. Powers and duties.

- (1) The Council to keep general track of grants to ensure compliance with non-discrimination provisions above.
- (2) The Council to keep general track of grants concerning the relative balance between different forms of cultural expression being aided by the grants, and to advise the Minister if they see a trend favoring one or another branch of the arts, or one or another school of art or music etc. unduly. All advice to the Minister to be made public.
- (3) The Council to submit suggestions to Minister concerning membership in the Council and membership on the Panel of Experts.
- (4) The Council to give advice to the Minister when requested by the Minister, or on its own initiative; except that the Council may not comment on particular grants or grant applications.
- (5) Council to receive copies of all Ministerial documents concerning grants: Grant applications, letters of reference to peer review panels, reports of peer review panels, etc.

c. Council of Cultural Ministers.

i. Membership. There shall be a Council of Cultural Ministers, consisting of the Ministers and Deputy Ministers of Culture of central and Provincial governments.

- (1) At meetings of the Council of Cultural Ministers, the Minister may attend either in person or by a representative.
- (2) The Council shall meet at least twice a year.

ii. Powers and duties



- (1) The Council of Cultural Ministers to adopt uniform Regulations for vetting grants under this Act.
  - (2) To discuss matters of common interest.
  - (3) To negotiate the proportion of the budget allocation for Culture received as block grants by the NMOC and PMOCs
- d. All regulations made by the Council of Cultural Ministers, NMOC or a PMOC under this Act to be subject to notice and comment, and, in the case of the Council of Ministers, and otherwise at the discretion of the relevant Minister as advised by the Advisory Council, a public hearing.

28. Sanctions

- a. A Ministry of Culture that does not follow the rules mentioned above for making grants (as to non-discrimination and as to Panel of Experts), has its grant for the following year diminished by the amount of grants made in the preceding year illegally.
- b. A Ministry of Culture may not expend any funds until it has in place an Advisory Council and a Panel of Experts.